STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2014
v	No. 309481 Jackson Circuit Court
ADAM BENJAMIN STEVENS, Defendant-Appellant.	LC No. 10-005622-FC

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and second-degree child abuse, MCL 750.136b(3). The trial court sentenced defendant to concurrent terms of 25 to 50 years' imprisonment for the second-degree murder conviction and 32 to 48 months for the second-degree child abuse conviction, with credit for 579 days served. We affirm.

I. FACTUAL BACKGROUND

Defendant was tried for first-degree felony murder and first-degree child abuse in connection with the death of his three-month-old son, Kian (born May 21, 2010). In the early morning hours of August 19, 2010, Blackman Township Rescue was dispatched to the apartment defendant shared with his girlfriend, Crystal Anderson, and their son Kian.[1] Kian was not breathing and had no pulse, and defendant was attempting to give Kian mouth-to-mouth resuscitation. Kian was transported to a local hospital, placed on life support, and stabilized before being flown to Mott's Children Hospital at the University of Michigan. Once at Mott, Kian was determined to be brain dead and was found to have suffered hemorrhaging to the brain. He passed away in the afternoon of August 19, 2010. The cause of death was abusive head trauma.

[1] Anderson's three children from a prior relationship also resided at the apartment through a shared custody arrangement, although they were not at home during the incident in question.

At trial, the prosecution presented evidence that the defendant and Anderson were the only people in the apartment with Kian when he became unresponsive. Anderson testified that she was sleeping in one of the bedrooms and awoke to hear a strange cry come from Kian, who had been sleeping in the living room. When she went out to the living room, she saw defendant holding Kian upside down with one hand on Kian's back. Anderson took Kian from defendant and saw that he was gasping for air; he then went limp and his eyes rolled back. She called 911 as the defendant performed CPR on Kian. Anderson further testified that defendant had been "rough" with Kian on previous occasions, indicating that although defendant did not intend to hurt him, he played with him as though he was an older child.

In addition to Anderson, the prosecution presented witness testimony from several others: the policemen who were dispatched to the apartment; the detectives who investigated the case; Dr. Bethany Mohr, the medical director of the child protection team at Mott; Dr. Jeffrey Jentzen, who testified as an expert in forensic pathology; Rebecca Filip, an expert in domestic violence and the domestic violence cycle; Deborah Anderson, Anderson's step-mother; and Brandi Johnson, the defendant's ex-girlfriend. Dr. Jentzen also testified as a rebuttal witness.

Likewise, the defendant called several witnesses. Along with his own testimony, he called Sandy Williams, the mother of a friend who knew defendant for 23 years; his mother, Kathleen Stevens; and an expert, Dr. Mark Shuman, the associate medical examiner for Miami-Dade County in Florida.

During the course of the trial, the court asked questions of almost all of the witnesses who testified. Of the prosecuting witnesses, the trial court questioned one of the investigating officers, Crystal Anderson, Dr. Mohr, Dr. Jantzen, Rebecca Filip, Deborah Anderson, and one of the detectives. Of the defense witnesses, the court posed questions to Kathleen Stevens, the defendant, and Dr. Shuman.

The defendant's primary defense was that he had heard Kian crying during the night and as he lifted him from the bassinette, defendant tripped on a child's toy and fell, dropping Kian to the floor. Defendant presented the testimony of a forensic pathologist, Dr. Shuman, to establish that the head trauma suffered by Kian could have been caused by a fall such as that described by defendant. Defendant also called on Dr. Shuman to testify that (1) while a baby can be "shaken to death" the death-causing injury would be trauma to the neck, not the brain, (2) a shaking force significant enough to cause brain injury leading to death would also cause neck injury in an infant, and (3) Kian showed no signs of neck injury.

II. THE TRIAL COURT'S QUESTIONING OF WITNESSES

A. STANDARD OF REVIEW

On appeal, defendant first contends that he was denied a fair trial due to several instances of judicial bias during the trial court's questioning of the defendant and his expert, Dr. Shuman. Defendant objected only to one line of the trial court's questions and comments that he now challenges on appeal. Thus, he failed to preserve all, but one, of his claims. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996).

We shall review those comments and questions that defendant's lawyer did not object for plain error. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). Claims of judicial misconduct are reviewed to determine whether the trial court's comments or conduct evidenced partiality that could have influenced the jury to a party's detriment. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). We review unpreserved errors for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A trial court may interrogate witnesses, whether called by itself or by a party. MRE 614(b). But, a trial court has to be careful to frame its questions so as not to pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). A trial court "must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006) (quotation marks and citations omitted). The fact that elicited testimony may be harmful to a defendant's case does not demonstrate that the trial court's questioning was improper. *Davis*, 216 Mich App at 52.

B. ANALYSIS

Defendant first asserts that the trial court improperly used the words "alleged" and "allegedly" when it questioned the defendant during his direct testimony. After he testified that he had tripped over a toy truck on the floor and had dropped Kian, the trial judge, in a short series of questions, asked about the "alleged truck" and "truck that you allegedly tripped and lost your balance on?" While not objected to at trial, the defendant now takes issue with the trial court's use of those words. The trial court's word choice is unfortunate but it was an isolated incident. While the limited use of those words could tend to indicate the trial judge's disbelief of defendant, when viewed in isolation, this singular exchange during the trial was insufficient to unduly influence the jury. *Conley*, 270 Mich App at 308.

The defendant next argues that the trial court's exchanges with his expert witness, Dr. Shuman, were improper. First, while Dr. Shuman was testifying on direct examination about the differences between an adult and an infant's brain, the expert used the term "sloshing" to describe how a baby's brain rests among spinal fluid in a skull. The trial court interjected that there had been no expert testimony that an "infant's brain was sloshing around like an egg." Dr. Shuman countered that Dr. Mohr had testified that the "brain sloshed around." To which the court responded that "you would agree with me that other pathologists might have very different views" than yours on the issue. Dr. Schuman testified that he only was "trying to educate the jury on that's not how it works" and "there's people who may disagree with that." He continued "that the main issue is, the infant is much more susceptible to impact injury."

The defendant now also objects to the trial court's inquiry after Dr. Shuman testified that short falls can cause serious injuries and death, though that "rarely" happens. The trial judge asked if Dr. Shuman would define "rarely" and used the example of "one in a million" when

asking Dr. Shuman to quantify his use of the term. Dr. Shuman responded that a study had concluded that such an occurrence happened to less than one in a million children per year.

The trial court also questioned Dr. Shuman as to the distance he traveled to testify and whether traveling as far as he did was a common occurrence. Defense counsel objected that the fact that Dr. Shuman had traveled from Florida to Michigan to testify had no bearing on the case. The court noted the objection.

The defendant next argues that the trial court's questions to Dr. Shuman about the number of medical examiners that were qualified to testify on the issue at hand, and the number of those qualified pathologists that are in the Detroit, Flint, or Saginaw area were improper. The court also confirmed with Dr. Shuman that he was employed as an assistant pathologist in Miami-Dade County, as opposed to being the chief pathologist. The trial court also queried whether a chief pathologist has more experience in these matters than an assistant. In contrast, the defendant argues, plaintiff's expert previously testified he is the head medical examiner in Washtenaw County.

The next challenged exchange took place after Dr. Shuman was asked on direct examination to give a brief history of shaken baby syndrome, how it evolved, and where it is today. During his testimony, Dr. Shuman testified that there was a recent study that measured the accelerations of a 12-month-old doll's head when shaken vigorously and those of a seven-month-old baby when the baby was bouncing in a bouncy chair and that the accelerations were very similar. The trial court then asked whether this was a consensus view among pathologists. Dr. Shuman responded that there probably is a 50-50 split in opinion among pathologists.

The trial court also asked Dr. Shuman during his direct exam whether his autopsy reviews include looking at all of the investigative reports and whether the reports were as critical as reviewing the physical autopsy itself. Dr. Shuman responded that the investigative reports could be as critical. Then, during cross-examination, Dr. Shuman said he had not reviewed the reports in his review of Kian's death but that there were other cases in which he had reviewed such reports. The trial court then asked Dr. Shuman why he had not reviewed the police reports in Kian's case and if he normally does review such reports in suspicious death cases. Dr. Shuman said that he normally attempts to gather as much relevant information as possible regarding the circumstances of a death and that usually includes investigative reports and speaking with detectives, if he has enough time to do so. In Kian's case he did not have the time to do so.

On the flip side, the trial court asked questions of almost every prosecution witness in the case. While it may have questioned Dr. Shuman about the distance he traveled, during rebuttal the trial court also asked Dr. Jentzen, the prosecution's witness pathologist, about the distances he has travelled to give expert testimony on other cases. Dr. Jentzen testified that, like Dr. Shuman, he has flown across the country to testify. In response to the trial court, Dr. Jentzen also testified that part of his job duties as a pathologist was to testify in court, that he receives compensation for such testimony as part of his salary and that he has received separate compensation when he testified as an expert on behalf of the defense in cases.

While the trial court could have been more careful in its choice of words, the trial court did not unjustifiably arouse suspicion with its inquiries of the defense witnesses and thus we find no error. The testimony elicited may have been harmful to defendant's case but it was not improper. *Conley*, 270 Mich App at 308. The trial court merely questioned Dr. Shuman about his experience as a medical examiner and the type of methodologies he uses in preparing reports. Those lines of questioning were relevant. MRE 401; 403. In all but one of the instances the defendant made no objection to the trial court's questions. This failure to object cuts in favor that the remarks were not particularly prejudicial. *United States v Warshak*, 631 F3d 266, 305 (CA 6, 2010).

The trial court also instructed the jury:

> My comments, rulings, questions and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law—and to tell you the law that applies to this case. However, when I make a comment or give an instruction or ask a question, I am not trying to influence your vote or express a personal opinion about the case. If you believe I have an opinion about how you should decide this case you must pay no attention to that opinion. You are the only judges of the facts and you should decide this case from the evidence.

And later, during jury instructions, the trial court added "I may and have asked some of the witnesses questions myself. These questions are not meant to reflect my opinion about the evidence. If I ask questions my only reason would be to ask about things that may not have been fully explored."

"Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). In this case, the trial court's jury instructions that its comments, questions, and rulings were not evidence that should be considered by the jury were appropriate and, again, we find no error.

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

We review a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). When determining whether sufficient evidence has been presented to sustain a conviction, we view the evidence in a light most favorable to the prosecution and determine whether any rational tier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Carines*, 460 Mich at 757.

B. ANALYSIS

The elements of second-degree murder are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did

not have lawful justification or excuse for causing the death. *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Malice is the intention to kill, the intention to do great bodily harm, or the intention to create a high risk of death or great bodily harm with knowledge that such is the probable result. *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002). "Malice can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

Here, defendant challenges only the sufficiency of the evidence with respect to the malice element of his second-degree murder conviction. In order to prove the malice necessary for second-degree murder, the prosecution had to prove that the defendant intended to kill Kian, intended to cause Kian great bodily harm, or intended "to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to infer that defendant acted with the requisite malice. Testimony established that on several prior occasions Anderson had told defendant he was being too rough with Kian and had taken Kian away from defendant. Anderson testified that she actually had asked defendant whether he had heard of shaken baby syndrome and defendant admitted to Detective Boulter that he had been a little rough with Kian at first. In addition, the force required to inflict the brain injuries on Kian would have been substantial. Moreover, Dr. Jentzen testified that the injuries Kian ultimately died from had been inflicted a short time prior to the time he stopped breathing and the only people with Kian during that time were Anderson and defendant. Both defendant and Anderson testified that defendant was in the living room alone with Kian before Anderson awoke and Anderson testified that when she first saw defendant, he was holding Kian upside down. The evidence was sufficient, as a whole, for a reasonable jury to conclude that defendant intended "to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result."

IV. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

Properly preserved challenges to jury instructions are reviewed de novo on appeal. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). A trial court's determination regarding a supplemental jury instruction is reviewed by this Court for an abuse of discretion, and this Court "'will not reverse a court's decision regarding supplemental instructions unless failure to vacate the verdict would be inconsistent with substantial justice.'" *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008), quoting *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

B. ANALYSIS

During deliberations, the jury sent out the following question: "Is the child abuse charge to include past history or only from the night of August 18th?" Defense counsel indicated he was concerned with what the jury could be asking whether they could consider past history to

determine whether to find defendant guilty of a certain degree of child abuse (first, second or third degree) or were asking if they could convict defendant of child abuse for Kian's healing fractured ribs, or for the bump on his head, etc. In essence, while it was clear that the jury wanted to know if it could consider acts that occurred prior to August 18th, the purpose for which they sought to consider those acts was not clear. The trial court indicated it did not want the jury to disregard its limiting instruction concerning the other acts evidence and stated that it would direct the jury that it could consider any evidence that has been admitted concerning child abuse and then repeat the other act instruction. Defense counsel stated that if the jury was asking if it were allowed to consider prior acts for the purposes of actually convicting defendant of the same, however, the jury needed to know that it had to find that the other acts had to have been proved beyond a reasonable doubt. The court indicated that it understood but it was not sure where the jury was going with its question. It then instructed the jury:

> Your—your first question, is the child abuse charge to include past history or only from the night of August 18th? And I'm going to instruct you that any evidence can be considered for the child abuse charge, okay? But I also want to underscore another instruction to make sure you understand this other act evidence.
>
> You have heard evidence that was introduced to show that the defendant was involved in other alleged acts and/or conduct for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether the evidence tends to show that the defendant acted purposefully, that is, not by accident or mistake, or because he misjudged the situation. You must not consider this evidence for any other purpose. . . . All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime, that would include the child abuse that you've got charged that you asked the Court a question on, or you must find him not guilty, all right?

Defendant contends that the trial court's instruction that the jury could consider any evidence with respect to the child abuse charge effectively amended the felony information against him, which initially charged him with first-degree child abuse on a specific date. However, the felony information against defendant merely stated that defendant "did knowingly or intentionally cause serious physical harm to Kian Stevens, three months old, (born May 21, 2010), a child; contrary to MCL 750.136b(2)." Though the caption of the felony information indicates that the offenses took place on or about August 19, 2010, use of the terms "on or about" indicates that the date is imprecise.

Defendant further contends that because first-degree child abuse was the predicate felony for first-degree felony murder (the original charge) the jury only should have been allowed to consider child abuse directly associated with the death of Kian. Instead, through the trial court's supplemental instruction, the jury was allowed to consider *any* evidence of child abuse.

The jury's question, as acknowledged by defense counsel, did not clearly indicate for what purpose it questioned the consideration of the past acts of child abuse. Rather than reminding the jury of the specific acts that were alleged, the trial court crafted an instruction

advising it that it could consider any evidence that was allowed at trial, including the past instances of abuse. The trial court was careful, however, to remind the jury that the past instances of abuse, i.e. those that occurred prior to August 19th, were only to be considered for very limited purposes. The trial court specifically re-advised the jury, "[y]ou have heard evidence that was introduced to show that the defendant was involved in other alleged acts and/or conduct *for which he is not on trial. . .*" then reiterated that this evidence was to be considered only for very limited purposes. Thus, the trial court did not, as alleged by defendant, amend the information, or change the theory of child abuse. The trial court was very careful in instructing the jury that while any evidence could be considered for the child abuse charge, defendant was not on trial for the other acts evidence. The instructions sufficiently protected the rights of the defendant and fairly represented to the jury the issues to be tried, see *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994), and the supplemental instruction was not an abuse of discretion.

V. ADMISSION OF DR. MOHR'S TESTIMONY & "SIMILAR ACTS" TESTIMONY

A. STANDARD OF REVIEW

We review a trial court's decision on the admission of evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). However, decisions regarding the admission of evidence frequently involve preliminary questions of law, such as whether a rule of evidence or statute precludes admitting of the evidence. *Id.* This Court reviews questions of law de novo. *Id*. Accordingly, "when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id*.

B. DR. BETHANY MOHR

Defendant objected to any testimony from Dr. Mohr that did not relate to the injuries to or treatment of Kian. Defendant asserts that the trial court admitted the objected to testimony under MRE 803(4), the medical treatment exception to the hearsay rule. However, the trial court actually stated that Dr. Mohr was collecting information not only in her role as a doctor, but also in her role as medical director of the Child Protection Team and that the evidence "has a logical tendency to prove or disprove a fact of material consequence in a trial" such that the court would admit the challenged testimony. Thus, the trial court merely found that the evidence was relevant under MRE 401, not that it fell within the hearsay exception set forth in MRE 803(4).

Plaintiff having conceded that the admission of Dr. Mohr's testimony that Anderson had told her that there was a Child Services report because Kaylee had sustained an injury to her arm at the hands of defendant was, in fact, improper, we are charged with the determination of whether the error was sufficiently prejudicial to warrant reversal of defendant's convictions. MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of

> evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

In making such a determination, "this Court asks whether, absent the error, it is 'more probable than not' that a different outcome would have resulted." *Gursky*, 486 Mich at 619. Defendant bears the burden of establishing that the error resulted in a miscarriage of justice. *Id*. Where defendant cannot meet this burden, the error is deemed "harmless" and thus not meriting reversal of the conviction. *Id*.

Defendant has failed to meet his burden. Anderson testified that defendant threatened to hit Kaylee and that she had to stand between them on one occasion to prevent him from hitting her. Evidence also was presented that defendant wrote a letter to Anderson apologizing for the way he treated Kaylee and defendant testified that he was verbally abusive to Kaylee. Moreover, during the one mention of the report, it also was elicited that Anderson stated that defendant had accidently hurt Kaylee's arm and, on cross-examination, defense counsel elicited Dr. Mohr's acknowledgement that defendant said that the CPS report was unfounded and the investigation was closed shortly after it started. Finally, the minimal mention of the report was minor when considered against the remaining evidence presented against defendant concerning his treatment of Kian and Anderson. Had the evidence been excluded, then, it is not more probable than not that the outcome would have been different.

C. "SIMILAR ACTS" TESTIMONY

MCL 768.27b provides, in relevant part:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.
>
> ***
>
> (5) As used in this section:
>
> (a) "Domestic violence" or "offense involving domestic violence" means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:
>
> (*i*) Causing or attempting to cause physical or mental harm to a family or household member.
>
> (*ii*) Placing a family or household member in fear of physical or mental harm.
>
> (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(b) "Family or household member" means any of the following:

(*i*) A spouse or former spouse.

(*ii*) An individual with whom the person resides or has resided.

(*iii*) An individual with whom the person has or has had a child in common.

(*iv*) An individual with whom the person has or has had a dating relationship. . .

Under the statute, the other domestic violence acts evidence also is subject to MRE 403, meaning that such evidence, though relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. This Court makes two inquiries under the balancing test of MRE 403 with respect to previous acts of domestic violence that are being offered under MCL 768.27b. *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011). First, we "must decide whether introduction of [the defendant's] prior-bad-acts evidence at trial was unfairly prejudicial." *Id.* Next, we "must apply the balancing test and weigh the probativeness or relevance of the evidence against the unfair prejudice." *Id.*

Defendant does not dispute that second-degree murder concerning his son, Kian, constitutes domestic violence under MCL 768.27b. He contends, however, that evidence that he had verbally abused Kaylee, and had threatened to hit her and had injured her arm should have been excluded, as well as Anderson's testimony concerning several instances of domestic violence against her including when defendant punched holes in the apartment wall and closet door, threatened her, destroyed her cell phone, and shoved her, because such evidence was not relevant and was more prejudicial than probative. We disagree.

The evidence concerning Kaylee was relevant because it tended to show that defendant had a propensity toward violence with children in the household. It also tended to refute his claim that any injury to Kian was accidental. The evidence concerning repeated acts of domestic violence against Anderson likewise was relevant to show that he may have committed an assault against Kian that caused his death. A defendant's tendency to commit domestic assault in the past is highly relevant to whether he has committed another domestic assault. Evidence is relevant if it makes any fact of consequence more or less likely to be true. MRE 401. Having a "complete picture of a defendant's history" can help a jury determine how likely it is that a given crime was committed, *People v Pattison*, 276 Mich App 613, 620-621; 741 NW2d 558 (2007), as well as being "highly relevant to show [a] defendant's tendency to assault" again, *People v Railer*, 288 Mich App 213, 220; 792 NW2d 776 (2010). Accordingly, the prior acts were relevant to help the jury determine whether defendant assaulted Kian on this occasion and the trial court did not err in determining the evidence was relevant.

Nonetheless, evidence could be unfairly prejudicial if it had a "tendency . . . to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock," or if "marginally probative evidence"

was to be given "undue or preemptive weight by the jury." *Cameron*, 291 Mich App at 611. But, the balance is to be tipped in favor of probative value. *People v Watkins*, 491 Mich 450, 455-456; 818 NW2d 296 (2012).

Defendant has not demonstrated that he was unfairly prejudiced by the evidence. Defendant has merely stated that the evidence was unfairly prejudicial without providing any supporting authority or explaining how the evidence injected considerations extraneous to the merits of the lawsuit. While the evidence was damaging, as is most evidence presented against a criminal defendant, we do not find that it interfered with the jury's ability to rationally weigh the evidence concerning Kian's death. Moreover, in its final instructions, the trial court gave a cautionary instruction to the jury concerning the proper use of the evidence, thereby limiting any potential for unfair prejudice. See *Cameron*, 291 Mich App at 612.

VI. SENTENCING GUIDELINES

A. STANDARD OF REVIEW

Under the sentencing guidelines, a circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. *Id*.

B. ANALYSIS

Defendant objects to the scoring of OV 7 and OV 13, but not to the scoring of OV 10. OV 7 addresses aggravated physical abuse. MCL 777.37(1). Under OV 7, the court must assess 50 points if "a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). "[U]nless stated otherwise, only conduct that relates to the offense being scored may be considered." *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008).

The trial court based the score of 50 for OV 7 on the prosecutor's argument that defendant's conduct amounted to excessive brutality. That phrase is not defined in the statute. Pursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word or phrase is a term of art. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). We consult a lay dictionary when defining common words or phrases that lack a unique legal meaning. *Id*. at 151-152.

"Excessive" is defined as "exceeding a normal, usual, reasonable, or proper limit." *The American Heritage Dictionary of the English Language* (2006). "Brutality" is defined as "a ruthless, cruel, harsh, or unrelenting act." *Id*. The term "excessive" within the phrase "excessive brutality," thus recognizes that while some baseline cruel or harsh act (brutality) may be inherent in the sentencing act itself, to score OV 7 at 50 points, the brutality employed must exceed the normal or usual brutality used in accomplishing the underlying offense. A similar, guiding interpretation can be found in *Hardy*, 494 Mich at 430.

In one of the two consolidated cases addressed in *Hardy*, our Supreme Court considered whether a defendant was properly assessed 50 points for OV 7 when he racked a shotgun pointed at the victim during the course of a carjacking. In conducting its review, the Supreme Court looked at the specific terms in the phrase "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense" and the dictionary definitions of each specific term. The *Hardy* Court then held that applying the relevant definitions, "it is proper to assess points under OV 7 for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount." *Id*. at 440-441. To determine whether conduct met that criteria, the *Hardy* Court proposed a two part test: "[T]he relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id*. at 443-444. The Court began its analysis by detailing the elements necessary to commit a carjacking and considering "whether racking the shotgun went beyond the minimum conduct necessary to commit a carjacking" *Id*. at 444. Only then did it consider the magnitude of the conduct itself.

Under a *Hardy*-like analysis, consideration must be given to whether defendant engaged in brutality beyond that necessary to commit second-degree murder in this case, i.e., that "exceeding a normal, usual, reasonable, or proper limit." To accomplish second-degree murder is undisputedly inherently brutal or, "a ruthless, cruel, harsh, or unrelenting act" and/or requires some nature of cruel or harsh act and there is going to be some type of injury inflicted in order to accomplish the ultimate crime. In this case, Kian died from head injuries caused by either severe shaking or a slam significant enough to generate enough force to cause the brain injuries. Because no one witnessed defendant inflicting the injury upon Kian believed to cause his death, it is not possible to determine whether defendant's conduct went beyond the minimum necessary to cause Kian's death. By all accounts, the injury was inflicted a short time prior to his death and there was no testimony to indicate whether Kian was shaken for a long time, a short time, or any time beyond that which would have been necessary to cause his death, or whether his head was slammed once, more than once with just enough force to cause the deadly injury, or far beyond that necessary to cause his death. In fact, defendant's expert testified that it is not possible to know what Kian's "threshold," i.e. the minimum amount of force necessary to cause injury leading to death was. Without this information, it is impossible to determine if the brutality employed by defendant was "excessive."

In assessing 50 points, the trial court indicated it was adopting the rationale set forth by the prosecutor. His rationale was that the amount of force necessary to inflict the brain injuries causing Kian's death was a severe shaking or a severe slam and that, alone, was excessive brutality. However, defendant was being scored for second-degree murder and it is unclear what amount of brutality would be deemed necessary to inflict the murder in an "ordinary" brutality case here and what would cross the threshold into "excessive" brutality when no one could positively state whether a slam or a shaking caused the injury, or the duration or number of the same. The prosecutor also referenced evidence of healing rib fractures and testimony concerning defendant previously shaking Kian and holding him upside down. However, unless stated otherwise, only conduct that relates to the offense being scored may be considered." *Sargent*, 481 Mich at 350. All experts agreed that the death causing injury was inflicted a short time prior to Kian's death and the rib fractures and prior instances occurred weeks, if not months prior.

Therefore, the trial court erred in assessing 50 points for OV 7. Under MCL 777.37, if 50 points are not scored, no points are scored. It is an "all or nothing" statute. Zero points should be scored for OV 7.

OV 10 addresses the exploitation of a vulnerable victim. 10 points are to be scored under this variable if the offender "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). "Exploit" means to manipulate a victim for selfish or unethical purposes. MCL 777.40(3)(b). "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c).

Defendant concedes that Kian was vulnerable, but contends that he did not exploit Kian under the definition provided, nor did he take advantage of a difference in size or strength. However, at sentencing, defense counsel did not object to the scoring of OV 10. He affirmatively stated that he had no objections when given the opportunity to voice objections to additional OV's. Because defense counsel affirmatively relinquished defendant's right to contest the scoring of OV 10, any error in the scoring of that variable has been waived. A waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

In any event, even accepting defendant's theory that he did not intentionally injure Kian, sufficient evidence existed within the record of exploitation or manipulation by defendant to support a scoring of 10 points on this offense variable. Defendant's theory was that he accidentally dropped Kian, but did not immediately tell anyone or seek medical attention for Kian. Instead, defendant tried to act as though he had no idea what had happened and attempted to get Anderson to tell the police that she and defendant checked on Kian at the same time so that it would appear he was never alone with Kian in order to manipulate the situation to avoid detection of his abusive behavior and to allow defendant to avoid responsibility. Thus, the record was sufficient to allow the scoring of OV 10 at 10 points.

OV 13 addresses a continuing pattern of criminal behavior and is to be scored at 25 points if the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. MCL 777.43(1)(c). For purposes of scoring this variable, all crimes committed within a five year period are to be counted, including the sentencing offense, regardless of whether the crimes resulted in a conviction. MCL 777.43(2)(a). Defendant was convicted of second-degree murder and second-degree child abuse; thus, there need only be one other crime committed within a five year period by defendant in order for OV 13 to be scored at 25 points. Anderson testified at trial that she saw defendant shake Kian many times where Kian's head would flop and his neck would be strained. Anderson testified that defendant would be "playing" with Kian in this manner, but that she would take Kian away and yell at defendant about hurting him. Anderson also testified that prior to Kian gasping for breath, she saw defendant holding him upside down and then flipping him up without supporting his head or neck. There also was testimony that Kian had healing rib fractures at the time of his death. While there was no direct testimony that defendant caused the rib fractures, Anderson's testimony concerning the rough manner in which defendant handled Kian is circumstantial evidence that he committed other instances of child abuse. Finally, there is no dispute that Kian had a large bruise on his forehead that he received when in the care of defendant. While defendant's explanation was that he bumped Kian's head on the baby swing, the testimony from

other witnesses was that the swing was an open top and it would thus have been difficult to bump his head. This, coupled with Anderson's testimony that the bruise appeared on the day that she attempted to break up with defendant which caused him to become very angry, is circumstantial evidence that defendant abused Kian that day. The trial court did not err in scoring OV 13 at 25 points.

When OV 7 is correctly scored at zero points, defendant's total OV points drop from 160 to 110. His PRV remains at 17. However, his OV level remains at III in the sentencing grid (level III is 100 points or more) and his PRV level remains at C. Thus, his sentencing guidelines are unaffected by the correction in his scoring. If a scoring error does not alter the appropriate guidelines range, then the defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). Therefore, defendant is not entitled to resentencing.

VII. CONCLUSION

The defendant's convictions for second-degree murder, MCL 750.317, and second-degree child abuse, MCL 750.136b(3), and his sentence are affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Riordan